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CHARLES ELMORE

Supreme Court of the United States

October Term, 1930.

No. 387

ETTA M. KLEIN, former administratrix of the estate of Solomon Klein, deceased, and also individually AMY K. EISENDRATH, BERNICE K. FRIEDLANDER and LAWRENCE KLEIN, *Petitioners*,

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONERS

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OPINION OF THE COURT BELOW

The opinion of the Court of Claims, rendered June 2, 1930, has not been officially reported but will be found printed at R. 11-13.

JURISDICTION

The jurisdiction of the Court is invoked under section 3 (b) of the Act of February 13, 1925 (43 Stat. 936, 939).

The judgment of the Court of Claims was entered on June 2, 1930 (R. 19). Application for writ of certiorari was presented on August 26, 1930 (R. 1), and certiorari was granted on October 20, 1930.

The suit is for the recovery of estate taxes erroneously and illegally assessed and collected jurisdiction of which is conferred upon the Court of Claims by section 145 of the Judicial Code, and section 3226 Revised Statutes.

QUESTIONS PRESENTED

1. Whether section 402 of the Revenue Act of 1918 requires that there shall be included as part of the decedent's estate the value of property which had been conveyed to his wife for life and in fee simple conditioned upon her surviving him with the provision in the deed for a reversion to the grantor in the case of his surviving the grantee.

2. If so, whether Congress has the power to require the inclusion of the value of such property in the computation of decedent's gross estate for estate tax purposes where the transfer was complete and irrevocable prior to the enactment of the taxing statute.

THE STATUTES

The Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1096) provides:

"Sec. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States: * * *."

"Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

* * * * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act). * * *."

STATEMENT

The facts are not in dispute and the case was submitted to the Court of Claims upon an agreed statement of facts (R. 11-13). So far as material to the issues involved, the facts are as follows:

Solomon Klein, a resident of the State of Illinois, died intestate on September 17, 1919, and his wife, Etta M. Klein, one of the petitioners herein, became the administratrix of his estate. She and the other petitioners, who are respectively daughters and son of decedent, are his sole surviving heirs and next of kin and distributees of his estate (R. 11).

On July 1, 1918, Solomon Klein conveyed to his wife, the said Etta M. Klein, two parcels of real estate in Cook County, Illinois, by deed providing as follows:

> "First. To have and to hold the said lands unto the said grantee for and during the term of her natural life, and if she shall die prior to the decease of said grantor then and in that event she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event remain vested in said grantor, his heirs, and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance.
>
> "Second. Upon condition and in the event that said grantee shall survive the said

grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have, and hold the said lands in fee simple, unto the sole use of herself, her heirs, and assigns forever.

"Said grantee covenants with said grantor that she will during the lifetime of said grantor promptly pay and discharge all taxes and assessments which may become due and payable on said lands, that she will keep all buildings and improvements situated thereon in good tenantable condition and repair and fully insured against loss by fire in companies acceptable to said grantor in the names of both said grantor and said grantee and in the event either of said buildings shall be destroyed or damaged by fire will apply all the insurance moneys received on account of such fire to the reconstruction or repair of the buildings damaged or destroyed, unless the said grantor shall in writing consent to otherwise invest the same in such manner that said grantee shall enjoy the income derived therefrom during her life and so that the capital shall belong to that one of the parties hereto who shall survive the other."

Upon the audit of the returns of the estate, the Commissioner of Internal Revenue included in the gross estate the value of the aforementioned property as a transfer intended to take effect in possession or enjoyment at or after decedent's death

within the meaning of section 402 (c) of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1097) (R. 12). It was agreed that the conveyance was not in contemplation of death (R. 12).

A claim for refund of additional tax paid thereon on the ground that the possession and enjoyment of the property so conveyed was not deferred until decedent's death, was rejected to the extent of the tax arising from the inclusion of the value of the realty, after having deducted therefrom the value of the life estate of the grantee. Suit was filed in the Court of Claims on March 19, 1928, to recover this amount and judgment was entered dismissing the petition on June 2, 1930 (R. 13). The petition for certiorari was not opposed.

The Court of Claims rendered an opinion (R. 14-19) in which it was held that the decedent had made a transfer intended to take effect in possession or enjoyment at his death; that this interest was a vested reversion of the remainder in fee of the property and that decedent's death was the event which made the transfer complete and effective and secured to the grantee Etta M. Klein the possession and enjoyment of the property contemplated by the statute. (R. 15.)

The court further held that where there is a reservation of a remainder or reversion in fee by the donor, the transfer is not complete and that the taxing act in force at the date of donor's death which taxes such interest is neither retroactive nor unconstitutional (R. 18).

SPECIFICATION OF ERRORS TO BE URGED

1. The Court of Claims erred in holding that the decedent had an interest in the property, the transfer of which interest became complete and effective only upon his death.

2. The Court of Claims erred in holding that the Revenue Act of 1918 which was passed subsequent to the effective date of the transfer here involved was not unconstitutional and retroactive.

3. The Court of Claims erred in giving judgment for the respondent.

SUMMARY OF ARGUMENT

1. The transfer in this case passed both possession and enjoyment from Solomon Klein in his lifetime and did not take effect either in possession or enjoyment at or after his death.

2. Inasmuch as the transfer in question was complete and irrevocable, the Revenue Act of 1918 so far as it undertakes to tax such a transfer made before its passage is unconstitutional and void.

ARGUMENT

I

The transfer in this case passed possession and enjoyment from Solomon Klein in his lifetime, and did not take effect either in possession or enjoyment at or after his death.

By the deed in this case Solomon Klein conveyed to his wife certain lands "for and during the term of her natural life, and if she shall die prior to the decease of said grantor, then *in that event* she shall by virtue hereof take no greater or other estate in such lands". It was further provided in the deed that "the reversion in fee in and to the same shall *in that event* remain vested in the grantor, his heirs and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance". (Italics supplied.)

The decision of the Court of Claims was based upon the theory that decedent had an interest in the property, the transfer of which was complete at his death, and that the value of this interest was required to be included in his gross estate by section 402 (c) of the Revenue Act of 1918.

In determining the estate created by a deed, a court will consider the deed as a whole. This was an ordinary warranty deed of conveyance. There is nothing in the granting clause to indicate the nature of the estate conveyed. It is only in the habendum that the precise nature of the estate conveyed is considered.

> "If the granting clause mentions no estate, the habendum becomes efficient to declare the intention of the grantor and will rebut any implication that would otherwise arise from the omission in this respect in the granting clause." *Riggin v. Love*, 72 Ill. 553.

In the case at bar, the habendum is divided into two clauses in the first of which the petitioner, Etta M. Klein, is given a life estate and nothing more unless she survives the grantor. In the second clause, however, a conveyance in fee is made to the petitioner, Etta M. Klein, upon the condition and in the event that she shall survive the said grantor.

There is thus in the same instrument a conveyance of a life estate and a conditional fee simple estate to the same person, namely, Etta M. Klein.

If the terms of the deed vest a fee in the first taker, other parts of the instrument showing an intention to give a less estate will not control.

Carpenter v. Van Olinder, 127 Ill. 42.

A deed to a grantee for life with remainder to the grantor if he should survive the grantee, otherwise to the heirs of the grantor, gives the heirs no estate by purchase but leaves in the grantor a reversion which he is capable of transferring by a subsequent deed.

Blankenship v. Blankenship, 116 Tenn. 394; 92 S. W. 854.

See also *Turner v. Hause*, 199 Ill. 464.

We submit that the deed herein plainly indicates an intention to grant not only a life estate but also a determinable or a conditional fee to the grantee, Etta M. Klein; and that the greater estate or fee naturally swallows up the lesser or life estate when created by the same instrument.

The phrase, "if she shall die prior to the decease of said grantor" refers to a condition which might

not happen and, in fact, did not happen. As the event did not happen, the determinable fee was at the death of the grantor enlarged into a fee simple.

Challis, Real Property, pp. 197, 200.
Friedman v. Steiner, 107 Ill. 125.

In the last named case it was held:

> "One of the peculiarities of a fee determinable is that it may become a fee simple absolute upon the happening of any event which renders impossible the event or combination of events upon which the estate is to end. * * * It is the uncertainty of the event and the possibility that the fee may last forever that renders the estate a fee and not merely a freehold."

The court below held that until the death of the grantor "the whole legal title to the fee, subject only to his wife's life estate, was vested in him as well as his vested remainder in fee of the entire reversionary interest". (R. 15.)

In *Brattle Square Church Prop. v. Grant*, 3 Gray (Mass.) 142, the court held:

> "All the estate vested in the first grantee notwithstanding the qualification annexed to it. * * * Until the happening of the contingency or breach of condition by which the precedent estate is determined, it retains all

> the characteristics and qualities of an estate in fee. Although defeasible, it is still an estate in fee."

The court further held in this case that there is no remainder because the fee, being exhausted by the prior gift, there is nothing left to constitute a remainder.

In *Hart v. Lake*, 272 Ill. 60, 65, 122 N. E. 286, the court said:

> "A conveyance upon a condition subsequent passes a base or determinable fee, leaving no reversion in the grantor. What is left in him is only a right to defeat the estate so granted upon the happening of the contingency, with a naked possibility of a reverter which is incapable of alienation or devise although it descends to his heirs. Possibility of reverter devotes no estate, but as the name implies, only the possibility to have the estate at a future time."

The right or interest under the possibility of reverter is very like though not strictly identical with a reversion.

Kales on Future Interests, Sec. 1.

The difference between a reversion and a reverter is pointed out in *Whitehead, Law of Real Property in Illinois*, Vol. 1, Sec. 61, as follows:

> "A reversion arises by operation of law and

not by deed or will and it is a vested interest or estate. A reverter is that species of reversionary interest which exists when the grant is so limited that it may possibly terminate, but the estate may continue forever."

Directing a reversion is inapt as a reversion arises by an operation of law and not by deed or will.

Boyce v. Mosely, 102 S. C. 361, 86 S. E. 771.

A reversioner has no right to possession during the continuance of the preceding estate. (Lane v. Thompson, 43 N. H. 320.)

In *Hunter v. Middleton*, 13 Ill. 50, the Court said:

"The title may revert to the former owner * * * but until the estate is thus defeated, the fee is as completely out of him as if he had made an absolute and unconditional conveyance. * * * Having neither the legal title nor the exclusive right of possession, he cannot bring trespass for any injury to the freehold. He had no title to be assailed, no possession to be invaded."

We submit that it is likewise with Solomon Klein, the grantor herein. After the conveyance and until the happening of the condition he had no legal title or possession of the fee, and upon his death there was no interest, the value of which

was required to be included in his estate for taxation.

See also *Brown v. Brown*, 247 Ill. 528, 534; 93 N. E. 357.

A statutory warranty deed containing a restriction that in case the grantee shall die before his wife dies, and any children survive him, the surviving children and his wife shall have the use of the land during the wife's lifetime, when it shall go to the children if any are living, but if at the death of the grantee no children survive him, the title shall be in the grantor, was held in *Stoller v. Doyle*, 257 Ill. 369, 110 N. E. 959, to create a fee simple in the grantee which ceases to be a fee simple upon the one contingency that the grantee's wife shall survive him.

The grantee in such case was held to take a fee with limitations over which may terminate the estate.

Other cases involving a conveyance of a base or determinable fee similar to that in the case at bar are the following:

Sterling v. Huntley, 139 Ga. 21; 76 S. E. 325.

Thomas v. Williams, 105 Minn. 88; 17 N. W. 155.

Fogarty v. Stark, 86 Tenn. 610; 8 S. W. 846.

Case v. Dwire, 60 Iowa 442; 15 N. W. 265.

Looking at the deed from the standpoint of Solomon Klein's estate (*Y. M. C. A. v. Davis*, 264 U. S. 47), we respectfully submit that the said Solomon Klein had at the time of his death neither possession nor enjoyment as defined in the statute of any

part of the property conveyed to Etta M. Klein, the grantee under this deed.

See *North v. Graham*, 235 Ill. 178; 85 N. E. 267.

II

Inasmuch as the transfer in question was complete and irrevocable, the Revenue Act of 1918 so far as it undertakes to tax such a transfer made before its passage is unconstitutional and void.

In *Nichols v. Coolidge*, 274 U. S. 531, 543, this court with respect to the statute here under consideration held:

> "In so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

In *Saltonstall v. Saltonstall*, 276 U. S. 260, and again in *Chase National Bank v. United States*, 278 U. S. 327, an outstanding power of disposition was reserved exclusively to the transferror for his own benefit and this court held that the non-exercise of that power was as much a disposition of the property testamentary in nature as would be its exercise at death. It was held that the conse-

quent passing to designated beneficiaries of all rights under the property free from the possibility of its exercise is the legitimate subject of a transfer tax.

In the case at bar when the grantor made and delivered an irrevocable deed *inter vivos*, his possession and enjoyment of any interest in the property ceased and determined, and all that his death did was to forever divest him of the possibility of again ever coming into possession and enjoyment.

Reinecke v. Northern Trust Co., 278 U. S. 339, involved five irrevocable trusts in all of which it was provided that the corpus should not come into the possession of the beneficiaries until after the grantor's death. Some of them provided for accumulation of the income in whole or in part during the grantor's lifetime; and some of them provided that some or all of the income should be paid to beneficiaries during the grantor's lifetime, although the corpus was not to come to them until after her death.

In that case this court held as follows (p. 347):

> "One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos* equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the

donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute."

In *May v. Heiner*, 281 U. S. 238, a contingent equitable life estate was reserved to the grantor if she should survive her husband, an event which never happened. The Government contended that the reservation of this contingent life estate operated to retain an interest in the property which was taxable at death. This court held that the transfer was not taxable as follows (p. 243):

"It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event."

As in the May case the title to the property in the case at bar had been definitely fixed in the deed of Solomon Klein to his wife, and the only interest therein which Mr. Klein possessed was that the property might possibly revert to him at the death of his wife. This was in fact no interest but an interest to arise, and as the court has said in the May case, the mere possibility was obliterated by the grantor's own death in the grantee's lifetime.

The fact that the deed in the case at bar provided that the grantee should pay taxes, keep buildings in repair and fully insured, and upon their damage or destruction should apply the insurance money to reconstruction, if required, we submit is similar to that in the case of *Reinecke v. Northern Trust Co., supra*, where the grantor reserved the right to control trust investments, vote trust stock during his lifetime, and even to alter the trusts with the consent of a majority of the beneficiaries, which provision the court said did not render the transfer in that case incomplete.

In *Tyler v. Tyler*, 281 U. S. 497, the question presented was as to the constitutionality of determining the value of decedent's net estate by including therein the value of property held by tenancy by the entireties. In its opinion the Court pointed out that Section 201 of the taxing act imposed the tax "upon the transfer of the net estate", and if that section stood alone, the inclusion of such property (jointly owned property) in the gross estate of the decedent probably could not be justified by the terms of the statute. But Section 202 definitely included such jointly owned property and on this ground the tax was sustained.

In view of the statement of the Court in *Reinecke v. Northern Trust Co., supra*, that by reason of the fact that Section 401 explicitly taxes net estates of decedents, it is doubtful whether the phrase, "to take effect in possession or enjoyment at or after his death", includes any others than

those passing as transfers at death we submit that the Tyler decision is not in point here.

In any event a salient difference exists between the interest here under consideration and the rights of the parties in the Tyler case. In the Tyler case each of the parties owned all of the property with equal rights therein, but here the grantor Klein had only a contingent interest in the property, the title to which he had heretofore irrevocably transferred, and this contingent interest was prevented from ever arising by the fact of his death. Thus the interest possessed by him prior to death was "obliterated by that event", and nothing of a property interest "passed from him to the living". *May v. Heiner, supra.*

It seems to us that the Court below has overlooked the fact that it was Mrs. Klein's death, *not her husband's*, which determined her estate, whether life or fee simple.

It is indisputed that if the decedent had no interest which passed by reason of his death with respect to the property which had been transferred in his lifetime, there is nothing that can be taxed with respect to such prior transferred property. This property passed to the grantee not by reason of the death of Solomon Klein, but because he had declared such should be the case by the execution and delivery of the deed of conveyance *inter vivos*. When he executed and delivered such deed he divested himself of all right, title and interest in and to the property, and when he subsequently died, nothing of a property interest passed to the

grantee which would have been the case otherwise. *Reinecke v. Northern Trust Co., supra.*

CONCLUSION

It is respectfully submitted that in so far as Sec. 402 (c) of the Revenue Act of 1918 operates to impose an estate tax upon any part of the transfer made by Solomon Klein to his wife as hereinbefore set forth, the statute is beyond the constitutional power of Congress and the decision of the court below should be reversed.

Respectfully submitted,

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February 3, 1931.